

Exhibit E



Deposition of:
Thomas Kinney , M.D.

June 17, 2017

In the Matter of:
**In Re: Bard IVC Filters Products
Liability**

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1 BY MR. BROWN:

2 Q. And will you please ballpark the number of Bard
3 documents that were in that Dropbox.

4 A. I'm going to guess 20.

5 Q. Okay. Was the material that was provided to you
6 in the Dropbox folder the material that you reviewed and
7 relied upon in providing the opinions that are contained
8 in your expert report in this litigation?

9 A. It was back-up material. The main source for my
10 document was the Kessler report.

11 Q. So the material that was provided to you on the
12 Dropbox, you're saying, was just some back-up information;
13 but the primary source of what you relied upon in
14 authoring your report was the Kessler report?

15 MR. JOHNSON: Form.

16 BY MR. BROWN:

17 Q. Is that right?

18 A. Let me clarify a little bit more, or I guess
19 embellish. So there -- For instance, there was a 510(k)
20 that I reviewed for the original Simon Nitinol filter.

21 There was deposition from Dr. Asch that was in there,
22 as I recall.

23 Q. Okay. And those were part of the Dropbox
24 materials?

25 A. Correct.

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1 A. It is.

2 Q. I will represent to you that this is the
3 curriculum vitae that was attached to your expert report
4 in this case. Okay?

5 A. Right.

6 Q. Is that curriculum vitae the most current
7 curriculum vitae that you have?

8 A. Yes.

9 Q. Doctor, I see here you received a master's
10 degree in mechanical engineering in 1979; is that right?

11 A. Yes.

12 Q. As part of that master's degree in mechanical
13 engineering, and your previous degree, which was a
14 bachelors in physics, did you have any coursework that
15 involved inferior vena cava filters?

16 A. No.

17 Q. How about implantable medical devices generally?

18 A. No.

19 Q. You don't have a Ph.D. in biomechanical
20 engineering, do you?

21 A. No, I do not.

22 Q. Then you started medical school in 1983?

23 A. Yes.

24 Q. Did you work continuously as an engineer between
25 1979 when you received your masters in mechanical

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1 engineering and 1983 when you started medical school?

2 A. Yes, I did. I worked for NASA for a year and a
3 half doing aeronautical design and wind tunnel.

4 And then I worked for Thomas Fogarty as a bioengineer
5 designing medical devices, prototyping medical devices,
6 and doing FDA submissions for four years.

7 Q. Why don't we start with the job you took
8 immediately after receiving your master's degree in
9 mechanical engineering. Was that the job with NASA?

10 A. That was the job with Thomas Fogarty.

11 Q. Okay. And what specifically did you do for
12 Dr. Fogarty?

13 A. We were designing angioplasty balloons. We did
14 pathophysiology experiments with mechanism of angioplasty.
15 We designed vascular clamps.

16 He was a referral person for many other physicians
17 that were interested in innovation and design, so we did
18 some ureteral dilators for one of his urology colleagues.

19 I designed a vascular clamp for one of Dr. Fogarty's
20 former partners, Dr. Pat Daily, who was here at San Diego.

21 We also got involved in designing a cardioplegia
22 jacket to do cardiac bypass. And that was a project I
23 continued when I went to medical here, and that project we
24 actually did a 510(k) submission for FDA as well.

25 Q. You mentioned a number of medical devices that

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1 there, his report. I wouldn't have any other specific
2 knowledge in, say, 2000 I was kind of doing other things.

3 Q. Okay. You mentioned that you continued your
4 work with the cardioplegia jacket when you began medical
5 school in 1984; is that right?

6 A. 1983.

7 Q. '83.

8 And, then, did you continue to work with the
9 cardioplegia jacket through the time that you were in
10 medical school?

11 A. We did. So that -- that became -- I went to
12 medical school here at UCSD, and we had an independent
13 study project, and that was my study project for my
14 graduation, and we actually did a human -- human trial
15 actually. We evaluated that in humans actually. And that
16 that passed to another engineer as I kind of moved onto my
17 internship.

18 Q. What was your role in the study regarding the
19 cardioplegia jackets used in humans?

20 A. Well, we -- we made -- we made the jacket, and
21 we -- we actually were measuring -- we made these -- they
22 are mister probes to measure the temperatures to see if it
23 was effective in terms of achieving the temperatures that
24 they felt were protective during the periods where the
25 heart was stopped to do these prolonged procedures for --

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1 that are elicited by a balloon in a different size
2 stenoses, and that got published in Academic Radiology.
3 The reason I'm kind of laughing is my other authors on
4 there told me they didn't understand a word I was saying
5 in there, but -- but that was engineering. Yeah, it was a
6 mechanical analysis.

7 Q. So you performed like a mathematical mechanical
8 analysis?

9 A. Right.

10 Q. Right?

11 A. Yes. Yeah.

12 Q. But as far as actually designing medical
13 device-type work, like you would do as a mechanical
14 engineer, did you stop doing that after medical school?

15 A. I didn't design anything. But, you know, I --
16 Matthew, I did get involved with a patent lawsuit with
17 Bard actually with their Mahurkar catheter, and there was
18 a lot of engineering analysis about the theories of how to
19 get better flow from those with different sort of channels
20 and things like that. So there was some mechanical
21 aspects of that. But actually, design -- it was kind of
22 evaluating design, if you will, Matthew, but it wasn't --
23 we weren't building stuff or changing stuff, but it was
24 kind of looking at the evaluation of the novelty of the
25 ideas, those sort of issues.

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1 Q. Okay. And what product did that relate to
2 again?

3 A. It was a Mahurkar hemodialysis catheter.

4 Q. Can you describe for us what that is?

5 A. It's a catheter that is implanted in a jugular
6 vein, goes to just above the heart. It stays in the
7 patient for extended periods of time. It has two access
8 ports, one blood goes in and one blood comes out, and it
9 gets hooked to a dialysis machine.

10 Q. Since graduating from medical school in 1987,
11 you have been a full-time practicing physician?

12 A. Correct.

13 Q. Would it be fair to say that you focused the
14 last 30 years of your professional career to treating
15 patients?

16 A. Yes.

17 Q. You don't hold yourself out as an expert in
18 designing IVC filters, do you?

19 A. Well, I have an interest in IVC filters, and I
20 published quite a bunch of articles. So there's an
21 element of -- there's a knowledge of expertise, and then
22 there is an engineering background. So while I don't
23 design -- I haven't designed IVC filters. I can look at a
24 design and evaluate its features or the plusses and
25 possibly the minuses of the features of that device based

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1 A. Help me, Matthew. What does that mean,
2 "demonstrative"?

3 Q. The physicians come in, and you are showing them
4 how these devices look in a bench top setting.

5 A. Correct.

6 Q. But as far as actually designing bench top
7 testing that is going to be submitted to the FDA, for
8 example?

9 A. No, we did not do that. That's correct.

10 Q. Would you agree that you're not an expert in the
11 field of marketing?

12 A. No, I'm not a marketer. No.

13 Q. Do you have any education, training, or
14 experience in marketing?

15 MR. JOHNSON: Form.

16 BY MR. BROWN:

17 Q. You can answer.

18 A. I have no experience in marketing. Other than
19 marketing myself as a physician, I guess. That's -- We
20 all kind of market ourselves, you know, on a level.
21 You -- We deal with people. We're -- Physicianship is
22 kind of one on one, so there's a -- I don't know. It's
23 not commercial marketing, I guess, is what you're saying,
24 Matthew. Sorry.

25 Q. Do you hold yourself out as an expert in the

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1 plaintiffs?

2 A. These two fine gentlemen mostly.

3 MR. LOPEZ: He just looked at you, Joe, when he
4 said that.

5 MR. JOHNSON: I agree with him.

6 THE WITNESS: He was the closest to me.
7 Actually, I got involved because Wendy was so nice.

8 BY MR. BROWN:

9 Q. In your report that we have marked as Exhibit 4
10 to today's deposition, do you agree that you're helping to
11 support the plaintiffs' arguments in this lawsuit?

12 MR. JOHNSON: Form.

13 THE WITNESS: I would say yes.

14 BY MR. BROWN:

15 Q. In your report, do you agree that you are making
16 an argument for the plaintiffs' position in this lawsuit?

17 MR. JOHNSON: Form.

18 THE WITNESS: I guess maybe I should ask you to
19 be more specific, I guess.

20 BY MR. BROWN:

21 Q. Well, the report that we have marked as
22 Exhibit 4 is several hundred pages long, and it lays out
23 opinions that you subscribe to at the end related to
24 Bard's IVC filters; is that right?

25 A. Correct. Correct.

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1 Q. And the upshot of the report is that in the
2 opinion of the authors, Bard filters are defective.

3 You understand that?

4 A. Yes.

5 MR. LOPEZ: Object to form.

6 BY MR. BROWN:

7 Q. So in this report, do you agree that you're
8 making an argument for the plaintiffs' position in this
9 lawsuit?

10 MR. JOHNSON: Form.

11 THE WITNESS: Yes.

12 BY MR. BROWN:

13 Q. I want to turn to Paragraph 14 of the report.

14 A. (Indicating.)

15 Q. Paragraph 14 says, "We apply the same analyses
16 and methodology in reaching these kind of opinions as we
17 apply in our professional, clinical and teaching
18 capacities and in many respects in our research, writing,
19 and submitting medical articles to peer-reviewed journals
20 and publications."

21 Do you see that?

22 A. I do.

23 Q. Can you describe what you mean by that?

24 A. Well, I do peer-reviewed articles as a reviewer,
25 and so I have to analyze and look at the methodology of

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1 Q. Would you agree that if you did ignore data that
2 weighs against the opinion that Bard's filters are
3 defective, that you would be applying the same level of
4 intellectual rigor in this case as you apply in your
5 private practice as a researcher and clinician?

6 MR. JOHNSON: Form.

7 THE WITNESS: I would say that I'm always
8 willing to look at data. If you have some data to show
9 me, I'd be happy to look at it and opine about it.

10 BY MR. BROWN:

11 Q. In drafting this report, did you take data and
12 information out of context?

13 A. I don't think so.

14 Q. If you did take data and information out of
15 context, would you agree that you wouldn't be applying the
16 same level of intellectual rigor to your work in this case
17 as you apply in your work as a clinician?

18 MR. JOHNSON: Form.

19 THE WITNESS: Again, I would say show me what
20 you don't agree with, and we'll look at it and make an
21 intelligent decision.

22 BY MR. BROWN:

23 Q. Okay. How was the report, which we marked as
24 Exhibit 4, prepared?

25 A. We basically used the document by Dr. Kessler is

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1 what we did, and we were -- we were asked -- we were
2 tasked, actually, as interventional radiologists who were
3 academicians and involved with some of the writing
4 standards about IVC filters, and we were tasked to assess
5 the information that was provided by Bard about their
6 filters, and whether we thought that there was
7 transparency in that in our approach to, say, getting
8 consent for patients.

9 We were -- I lost my train of thought. Sorry.

10 MR. LOPEZ: If you need to refer to your report,
11 you can, by the way.

12 THE WITNESS: Yeah.

13 You know, as clinicians that have multiple years of
14 experience on IVC filters, we were, you know, able to make
15 opinions about, you know, what we thought was done. We
16 were able to assess the data that he presented, some of
17 the experimental data, that included lab experiments and
18 animal experiments.

19 Basically, it was listed as a permanent filter that
20 had -- that was supposed to act like permanent filters
21 that we had before.

22 My career and Anne Roberts' career spans the
23 transition in filters from permanent devices to retrieval
24 filters. And we were promised that the retrieval filters
25 would have the same sort of performance characteristics

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1 that our permanent devices had. And unfortunately, as the
2 experience -- as the clinical experience accrued with the
3 retrieval filters, we were finding that that assumption
4 was not true, and there was -- it turned out, you know, I
5 had done a plenary session right before Bard did your
6 major marketing release of the Recovery Nitinol filter.
7 The -- The SIR meeting in 2004 was in Phoenix, and we
8 were -- my plenary session was on venous thromboembolism.
9 And we were all excited about having the use of retrieval
10 filters. Because we all remembered that ten-year-old kid
11 that had a trauma that we put a filter in, and he had that
12 filter for multiple decades, and we never felt real
13 comfortable talking to that patient or his mother or
14 father about what was going to happen with this multiple
15 decades. Really, you kind of say, "We don't really know,"
16 and that's an answer that families like to hear because
17 they -- they assume you are the doctor, you know
18 everything and, you know, you should know these things.

19 So again, I lost my train of thought. Sorry.

20 BY MR. BROWN:

21 Q. All right. Well, I'm interested right now in
22 how the report actually was physically prepared. Because
23 we have three authors and several hundred pages of
24 material here, and I want to get a sense as to how putting
25 pen to paper or fingers to the typewriter this was

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1 actually done.

2 A. Okay.

3 Q. So can you elaborate on how Exhibit 4 was
4 prepared?

5 A. I -- My section, I wrote looking at the Kessler
6 report, and I did a literature search on -- on the -- on
7 the retrieval -- all the Bard filters, basically, from the
8 initial animal studies. I even looked back at the Simon
9 Nitinol data. I had experience putting in Simon Nitinol
10 filters myself.

11 And so we looked at the preliminary data before some
12 of the animal -- I looked at some animal abstracts that
13 Dr. Kaufman wrote back when he was still at Boston, and
14 even before that, it was approved as a device for humans.

15 Then I looked at Dr. Asch's studies. And that study
16 was clearly done as a -- as just a retrievable study, and
17 it was a short-term study, but there were -- again, you
18 know, we talked about signals before. There were things
19 in that study that we were concerned about in terms of
20 there were some fractures, and there was a surprise
21 migration of a filter that they fortunately caught because
22 they had scheduled to retrieve it at that time.

23 And then there was a subsequent report that
24 demonstrated yet another issue with a filter that came out
25 a few years later.

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1 Then I looked at the 510(k), and I looked at the
2 studies that were involved in the 510(k).

3 What else did I look at? Then I looked at all the
4 documents that were listed by Dr. Kessler in terms of when
5 they did the market release which was, I recall, was in
6 January of 2004. And then the rapidity with what sort of
7 issues came up.

8 And the thing that surprised all of us that had
9 experience with the permanent filters was we were seeing
10 complications that we had never seen before. I do
11 remember my point about the plenary session. What I said
12 in that plenary session was that there were design changes
13 made in the retrieval filter to make it retrievable; and
14 again, we assumed that those design changes were made in a
15 compatible fashion that the performance characteristics
16 would be similar as a permanent filter. But I remember in
17 that plenary session saying that it's possible that the
18 features that make a filter retrievable may also make it
19 migrate easily or move, and those are design tradeoffs.
20 You know, this is the engineering aspect again, and we'll
21 see if that's what happens or not.

22 And so anyway, I am getting off the track a little
23 bit, Matthew, and I apologize. But basically, I went
24 through the Kessler report, and went through sequentially
25 all the different aspects of that.

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1 A. This was three to four weeks.

2 Q. At the very back of the report there is an
3 Appendix A.

4 A. (Indicating.)

5 Yes.

6 Q. It's titled, "Facts and Data Considered."
7 Do you see that?

8 A. I do.

9 Q. Were you given the literature listed here?

10 A. Yes.

11 Q. There are a number of expert reports that are
12 listed. Were you given those expert reports as well?

13 A. Yes.

14 Q. Did you read the full reports?

15 A. I did.

16 Q. Of all of the expert reports that are listed
17 here?

18 A. I did.

19 Q. Then you were given internal Bard documents that
20 are listed here?

21 A. Yes.

22 Q. Did you read the full documents?

23 A. Not -- Well, not -- Maybe not all of them. But
24 if, for instance, sometimes on the reproduced copies I had
25 of -- of Kessler's, I couldn't necessarily read some of

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1 the graphs, I would look then to make sure I was reading
2 those correctly. But this report was -- I felt so
3 comfortable with what he wrote, that I didn't read all of
4 those, no.

5 Q. You felt so comfortable with the report that
6 Dr. Kessler wrote?

7 A. Yes.

8 Q. The material that is listed in Appendix A, Facts
9 and Data Considered, this is the material that you believe
10 was on the Dropbox?

11 (Interruption in proceedings.)

12 MR. LOPEZ: Maybe it's a little more annoying
13 than I thought.

14 THE WITNESS: I'm sorry, Matthew.

15 BY MR. BROWN:

16 Q. Let me ask the question again.

17 The material that's listed in Appendix A, which is
18 titled, "Facts and Data Considered," is that the material
19 that you believe was provided to you via Dropbox?

20 A. Yes.

21 Q. How did you pick these documents from among all
22 the documents that were produced in the litigation or were
23 they just provided to you?

24 A. No. They were from the report, so I would find
25 a section that Kessler had written, and it would have,

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1 say, a table or some specific quoted number that was
2 important to me in my argument, and I would say, "Well,
3 this refers to this document."

4 And so it was much like I wrote a medical article
5 when I'm quoting what the article says. You give it a
6 reference, and that's -- that's the way I used these.

7 Q. So am I correct that these are all documents
8 that you requested specifically?

9 A. I didn't specifically request them, but they
10 were in this -- in Kessler's report.

11 Q. Were some of the documents that are listed in
12 Appendix A, documents that you did not specifically
13 request?

14 A. It's possible. I suppose, I mean...

15 Q. Are you aware that over 1.5 million documents
16 have been produced in this litigation?

17 A. I'm not surprised.

18 Q. Is that the first time you've heard that figure?

19 A. I don't think it is, actually. I think I've
20 heard there's a large number.

21 Q. And there are 42 documents that are listed in
22 Appendix A?

23 A. Correct.

24 Q. So that's less than 0.0028 percent?

25 MR. JOHNSON: Form.

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1 BY MR. BROWN:

2 Q. Agreed?

3 A. Yeah. Yeah.

4 Q. During the course of your practice, has any
5 medical device company, other than medical device
6 companies who you may have had a formal consulting
7 agreement with, ever showed you their internal documents?

8 A. No.

9 Q. Would you agree that the information in the
10 internal documents might be unreliable?

11 MR. LOPEZ: Form.

12 THE WITNESS: I'm not sure. Can you be more
13 specific? I'm not sure what you mean.

14 BY MR. BROWN:

15 Q. Sure.

16 In a general sense, would you agree that information
17 contained in internal company documents could be
18 unreliable?

19 MR. JOHNSON: Form.

20 THE WITNESS: That is a possibility. I mean,
21 anything could be unreliable.

22 BY MR. BROWN:

23 Q. Would you agree that data that's included in
24 internal company documents could be preliminary?

25 MR. JOHNSON: Form.

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1 A. Probably about -- Probably in the last, say, a
2 week ago.

3 Q. So about June 10th, 2017?

4 A. Right.

5 Q. Did you do any searching of materials that were
6 contained in that database?

7 A. I did, yeah.

8 Q. What did you search?

9 A. You know, like I said, if I had trouble reading
10 one of Kessler's things, and I was looking for something
11 to grasp or hard to read, I wanted to look and see, so I
12 would pull that document up.

13 Q. Okay. Other than pulling up individual
14 documents from Dr. Kessler's report that you wanted to
15 review, did you do any other searching of the material in
16 that database?

17 A. No. My -- My main focus was the Kessler report.
18 I guess in my report too.

19 Q. How did you access this database that you first
20 accessed about a week ago?

21 A. I'm not sure what you mean.

22 Q. Do you have -- Is it on the internet?

23 A. Yes. Yeah.

24 Q. Did you have to enter a user name and password
25 or something?

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1 BY MR. BROWN:

2 Q. Dr. Kinney, I want to turn to the back part of
3 your report to the schedules.

4 A. Okay.

5 Q. There is a Schedule 1 that says, "SIR Quality
6 Improvement Guidelines: Analysis of filters studied,
7 outcome and conclusions reached in referenced to
8 articles."

9 MR. JOHNSON: What page is that on, Matt?

10 MR. BROWN: It's after page 115.

11 MR. JOHNSON: Okay. I got you.

12 BY MR. BROWN:

13 Q. Do you have Schedule 1 in front of you, Doctor?

14 A. I do.

15 Q. Did you write this?

16 A. I did not.

17 Q. Do you know who wrote it?

18 A. I do not.

19 Q. Does Schedule 1 have any bearing on your
20 opinions that you have provided in the first 115 pages of
21 the report?

22 A. No. But they use the same articles I -- I cite
23 but no, I didn't -- I didn't use this.

24 Q. Do you know if Dr. Roberts or Dr. Kalva wrote
25 Schedule 1?

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1 A. I do not.

2 Q. Would you turn to Schedule 2, which is entitled,
3 "Bard Employees Testifying Regarding The Use Of SIR
4 Article Quality Improvement Guidelines."

5 Do you see that?

6 A. I do.

7 Q. Did you write this?

8 A. I did not.

9 Q. Do you know who wrote it?

10 A. I do not.

11 Q. Did you review Schedule 2 as part of drafting
12 the report?

13 A. I -- I recognize the comments on these because I
14 read the -- I read the depositions, but I did not use this
15 specific document.

16 Q. The next schedule is also entitled Schedule 2
17 and is entitled, "Bard Employees Testifying" -- Strike
18 that.

19 Sorry. It's a long schedule.

20 The next schedule is entitled Schedule 5, "Supporting
21 testimony from Bard employees on the importance of
22 providing pertinent information to physicians for making a
23 risk-benefit determination."

24 Do you see that?

25 A. I do.

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1 Q. Did you write this?

2 A. No, I did not.

3 Q. Do you know who wrote Schedule 5?

4 A. I do not.

5 Q. Did you review or rely on Schedule 5 in forming
6 the opinions expressed in the first 115 pages of your
7 report?

8 A. I didn't -- Well, I didn't use this schedule,
9 but I -- I recognize some of the comments again.

10 Q. You recognize some of the testimony from
11 depositions that you've read?

12 A. Correct. That's correct.

13 Q. But as far as the actual Schedule 5, you didn't
14 review or refer to it in drafting your report?

15 A. Correct. That's correct. It's possible that
16 those were written by Dr. Roberts or Kalva, but I don't --
17 I don't recall. You'll have to ask them.

18 Q. If you hop ahead to Schedule 5, there's a second
19 Schedule 5, just before Appendix A. It's entitled,
20 "Bard's internal documents demonstrating the improper use
21 of SIR Quality Improvement Guidelines."

22 A. (Indicating.)

23 Yes, I see.

24 Q. Do you see that?

25 A. I do.

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1 Q. Did you write this Schedule 5?

2 A. I did not, but I kind of made my own, actually,
3 when I was reviewing the -- the document that -- from
4 Kessler.

5 Q. What do you mean that you kind of made your own?

6 A. I was trying to keep track of the timing of
7 things, so I wrote it on a piece of paper. I'm not sure I
8 even still have the paper, but I -- it's such a long
9 document, it's -- The timing of things is kind of
10 important, so I kind of did that on my own.

11 Q. When you say it's such a long document, you're
12 referring to Dr. Kessler's report?

13 A. Right.

14 Q. And so as you were going through Dr. Kessler's
15 report, you were making notes to yourself about the
16 chronology of events listed in Dr. Kessler's report?

17 A. That's right.

18 Q. As far as Schedule 5 that we're discussing here
19 as part of your report, you didn't review or rely on this
20 in forming your opinions specifically; correct?

21 A. I did not use this, no.

22 Q. And you didn't write this?

23 A. I didn't.

24 Q. Do you know who wrote it?

25 A. I do not.